No. 11,789

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETRUS TOL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
Post Office Building, San Francisco, California,
Proctor for United States of America.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
233 Sansome Street, San Francisco, California,
Of Counsel for United States of America.

Subject Index

	Page
Statement of pleadings and jurisdiction	1
Statement of the case	2
Summary of the argument	5
Argument	7
I. A preponderance of the evidence shows that the vessel was not unseaworthy and that appellee was not negligent	7
II. The alleged injury did not proximately cause or contribute to appellant's disability	10
III. The District Court's allowance of one year's maintenance was reasonable and supported by the evidence as was the court's denial of allowance for so-called "nursing care"	13
IV. The trial court did not err in denying appellant's motion for continuance at the conclusion of the case..	15
V. The authorities cited by appellant are distinguishable and not in point	16
Conclusion	20

Table of Authorities Cited

Cases

Pages

Calmar Steamship Corporation v. Taylor, 303 U. S. 523, 82 L. Ed. 993 ..... 14, 15

Kreste v. United States, 158 Fed. (2d) 575 19

The Arizona v. Anelich, 298 U. S. 110, 80 L. Ed. 1075..... 17, 18

United States v. Forness, 129 Fed. (2d) 928 ..... 17, 18

United States v. One Device, etc., 160 Fed. (2d) 194..... 16

Statutes

The Suits in Admiralty Act, 46 USCA 742 1

War Shipping Administration Clarification Act, 50 USC Appx. 1291 1

No. 11,789

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PETRUS TOL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

In this case a libel *in personam* was filed by Appellant claiming damages and maintenance and cure against Appellee pursuant to the War Shipping Administration Clarification Act 50 USC Appx. 1291, thereby invoking the provisions of The Suits in Admiralty Act 46 USCA 742.

The cause of action for damages is based upon alleged negligence on the part of Appellee and unseaworthiness of its vessel assertedly due to Appellee's failure to supply and keep in order reels on said vessel SS "H. Weir Cook" for the handling of wire mooring cables or lines.

The case was heard before Hon. Louis E. Goodman, Judge of the United States District Court. A decree

in accordance with the findings of fact and conclusions of law was entered on May 22, 1947 wherein Appellant was denied recovery on his claim for damages and was awarded the sum of $1,277.50 maintenance, and $58.85 for unpaid wages, together with costs in the amount of $142.52—making a total of $1,478.87. Thereafter on June 5, 1947 Appellee deposited in the Registry of the District Court the sum of $1,478.87. On June 17, 1947 Appellant accepted the tender of Appellee, and on June 20, 1947 caused to be filed a Satisfaction of Judgment.

Appellant appeals from the findings of fact and the decree of the above-entitled Court denying Appellant damages.

STATEMENT OF THE CASE.

We find it necessary to set forth a statement of the case since Appellant has omitted to do so in conformity with the rule of this Honorable Court.

Appellant signed Foreign Articles as an able-bodied seaman on March 31, 1944 at San Francisco, California, for a foreign voyage aboard the SS "H. Weir Cook", a vessel owned and operated by the United States of America by and through the War Shipping Administration. (Tr. 196.)

On or about June 5, 1944 while the said vessel was proceeding toward Canton Island in the Phoenix group, in the Southwest Pacific, Appellant was assisting other members of the crew in coiling on deck a mooring line which was being pulled out of the hatch

(Tr. 201). Appellant testified that in the process of assisting another seaman to pull this inch and a half steel cable or line out from the hatch and over the hatch coaming the said steel line in some manner struck him in the region of the left temple (Tr. 202). This did not cause him to interrupt his work and he finished his watch (Tr. 230). The blow was not sufficient to cause Appellant to believe that he had received anything other than "just a bump", and it did "not hurt very much" (Tr. 226). He completed his job and went to lunch, at which time he noted that he had "a kind of a blue mark" on his left temple (Tr. 227). The matter was not of sufficient importance to him to report the incident to his superiors (Tr. 226) nor to anyone else; he "just let it pass" (Tr. 229). The same evening Appellant stood his next regular watch, and the next morning there was no visible mark or discoloration, and he paid no further attention to the affair (Tr. 226). Appellant further testified that he continued standing his regular watches for the next two days (Tr. 231). There was further testimony to the effect that while standing at the wheel he suddenly fainted and was unconscious for "a very short time" (Tr. 219 and 231) and that he then finished his watch (Tr. 207). Appellant was not sure whether the fainting episode occurred before or after the alleged accident (Tr. 228). In any event, he said he was constipated and that he fainted (Tr. 206). The following morning he was taken ashore at Canton Island (Tr. 206) and treated by Navy doctors for constipation for a period of approximately one week, during none of which time did he complain of

having been struck on the head or injured on board the vessel (Tr. 229).

Appellant returned to the ship and stood his regular watches for a period of 10 days or so while the vessel proceeded from Canton Island to Honolulu (Tr. 208-209) and he stated that he felt all right during that trip (Tr. 210).

Upon arriving at Honolulu, and while sitting in his room aboard the vessel, Appellant noticed that his left hand began to feel peculiar (Tr. 209). He went ashore at Honolulu, and while ashore he began to develop symptoms in his left arm and left leg. Thereafter, on June 26, 1944, he was taken to Queen's Hospital in Honolulu (Tr. 209) where the United States Public Health Service doctor diagnosed his condition as a left hemiplegia caused by "cerebral and generalized arteriosclerosis, with cerebral thrombosis and encephalomalacia" (Tr. 385). He remained at the hospital in Honolulu as an in-patient until October 16, 1944 (Tr. 385) and was then transported by vessel to San Francisco and admitted on October 23, 1944, as an in-patient at the Marine Hospital where a history was obtained by the Medical Officer in which it is reported that Appellant's chief complaint was "stroke", but no history of injury was given (Tr. 384). The diagnosis was substantially the same as that reported by the United States Public Health Doctor at Honolulu. He was discharged from further hospitalization and treatment October 30, 1944 (Tr. 383). On that date he returned to his home in Lyle, Washington (Tr. 210).

Appellant was examined at the city of The Dalles, Oregon, February 15, 1947 by Dr. John Raaf, Neuro-Surgeon, whose diagnosis was that Appellant was suffering from a left hemiplegia as the result of a cerebral thrombosis and softening of the brain (Tr. 37). It was the Doctor's opinion that the incident of the blow on the head was not the cause of his disability (Tr. 41). Dr. Raaf further stated that at the time Appellant was discharged from the Marine Hospital in San Francisco (October 30, 1944) his condition was practically stationary (Tr. 87).

SUMMARY OF THE ARGUMENT.

Appellee's position in this case is summarized as follows:

1. Appellant failed to meet the burden of proof in establishing that Appellee was guilty of negligence or that its vessel was unseaworthy by reason of the absence of so-called reels for mooring cables or lines. The evidence in this respect was overwhelming that the type of ship here involved, to-wit, a Liberty vessel, as well as Victory ships, do not have reels for mooring cables or lines and that mooring cables are stored below deck from where they are customarily hauled out on deck by hand in the manner that was employed at the time of the alleged injury. It was also testified to by a safety engineering expert that this was a safe practice. The preponderance of the evidence supports the trial Court's findings that the vessel was seaworthy and that Appellee was not negligent.

2. Even if it be asserted that the vessel should have carried a reel for mooring lines, which of course is denied, there is no showing in the record that the absence of such reels proximately caused or contributed to the alleged injury or disability suffered by Appellant.

3. Assuming that Appellant sustained an injury as alleged, the preponderance of the medical evidence is that his condition was unrelated to the alleged injury, but was, instead, due to a cerebral and generalized arteriosclerosis with cerebral thrombosis and softening of the brain—a condition which was not caused or contributed to by the claimed trauma.

4. The Court's allowance of one year's maintenance was based upon the medical testimony in the record and was in conformity with the law limiting maintenance to a reasonable period. Nor did the District Court err in denying Appellant's claim for recovery because of so-called "nursing care" allegedly rendered by Appellant's wife at home. There was no adequate proof of the necessity for such nursing care or, if such care was necessary, that it could not have been obtained at the United States Marine Hospital without cost to anyone. Both on the facts and the law, Appellant is not entitled to such recovery.

5. Denial by the District Court of Appellant's request for a continuance of the trial on the grounds of alleged "surprise of the testimony" of Dr. Raaf, who testified on behalf of Appellee, was not error, since there was no proper showing of surprise nor

any basis upon which the Court could properly continue the case. At the time of Appellant's motion he merely requested the opportunity to have the record transcribed and to consult other medical witnesses.

ARGUMENT.

I. A PREPONDERANCE OF THE EVIDENCE SHOWS THAT THE VESSEL WAS NOT UNSEAWORTHY AND THAT APPELLEE WAS NOT NEGLIGENT.

Appellant seems to lay great stress upon the absence of a so-called reel for mooring cables or lines and seeks to argue that by reason thereof Appellee was negligent and that the vessel was unseaworthy and, further, that this alleged negligence and unseaworthiness caused Appellant's injury.

The preponderance of the evidence clearly supports the District Court's holding that the vessel, which was a Liberty ship, does not customarily or at all have so-called reels for mooring cables or lines. Stanley R. Davis, District Supervisor for the Accident Prevention Bureau of the Waterfront Employer's Association, testified that he had been aboard and had inspected safety conditions on some 150 or more Liberty ships and that none of these vessels was so equipped (Tr. 95-96). Mr. Davis also testified that, as in the case at bar, the mooring lines on all Liberty ships were stored below deck and, when needed, were hauled out of the hatch and coiled on deck by hand, as was done in the instant case.

In being questioned as to how this operation was done, Mr. Davis testified as follows:

"A. They are hauled out ordinarily by hand.

Q. Do you understand the term of 'Faking'?

A. Yes, sir.

Q. Coiling, and so on?

A. Yes, sir.

Q. Is that the way that is done, taking it from the hatch?

A. The mooring line is hauled from the hatch and ordinarily faked or coiled on the deck.

Q. Alongside the hatch?

A. Alongside the hatch at the point where it will be used when the ship is moored to the dock.

Q. How is that done? By hand?

A. Always, ordinarily, always by hand.

Q. Is it the usual and proper method to have a man stationed at the hatch coaming and another man behind him a few feet, and then to haul it up from the hatch and fake it on the deck alongside the hatch?

A. Yes, sir." (Tr. 96).

On cross-examination Mr. Davis further testified that he had also been aboard something like 150 to 200 Victory ships for safety inspection and that he had never seen any reels for mooring lines aboard such vessels (Tr. 102-103).

Captain William S. Dodge, who had been sailing Liberty ships for several years, testified on behalf of Appellee that there was no such equipment as reels for storing mooring lines aboard such vessels (Tr. 103). He also testified that mooring lines were always

stored below deck and hauled out by hand when necessary (Tr. 104).

Opposing such impressive testimony there was no competent evidence from which the trial Court could find or even infer that the vessel was unseaworthy or that Appellee was negligent because of the absence aboard the vessel of such reels.

In the cross-examination of Mr. Davis, Appellant's counsel sought to show that there were reels on the decks of certain types of vessels for certain kinds of lines. However, Mr. Davis, in commenting upon a publication (shown to him by counsel) with reference to keeping certain types of lines on reels, testified as follows:

> "A. Your Honor, it specifies here *towing* lines. Towing lines are insurance lines and will be kept on deck. The Marine Bureau requires that. The insurance requires that. But not mooring lines." (emphasis supplied).

> "The Court. Q. What about handling lines? A. The handling procedure is the same. When you use a reel ordinarily, ordinarily one reel should be there, and when you use a towing line it would have to be rolled off the reel and made ready for any towing or salvage job which it is intended for. A mooring line, as I stated before, would be stowed below deck to keep it out of the weather, and when the ship makes into port they will take it from below deck and fake it out or coil it out on the deck of the ship. That is the general practice and one that has always been considered safe practice." (Tr. 101-102).

An attempt was made by Appellant's counsel to elicit testimony from one of the witnesses that if reels were used the mooring lines would not kink. In this regard the said witness, Jose Laines, in his deposition, which was offered in evidence by Appellant (Tr. 89), testified as follows:

> "Mr. Fish. As I understand it, you don't get the kinks if you use a reel, do you, if reels are used you don't have those kinks in handling the lines, do you?
>
> A. Well, sometimes you get kinks, sometimes line lay on deck, you know, and you have to take those kinks off.
>
> Q. I realize that, but if you use reels you don't get the kinks, is that true?
>
> A. Oh, sometimes gets some kinks." (Tr. 322).

We are quite satisfied, and we believe the record will bear us out, that Appellant has failed utterly to meet his burden of proving that the vessel upon which he was working was unseaworthy or that Appellee was negligent. Moreover, the absence of such reels is not shown by any evidence from which the trial Court could find or infer that the alleged injury or disability complained of was the proximate result of such alleged negligence or unseaworthiness.

II. THE ALLEGED INJURY DID NOT PROXIMATELY CAUSE OR CONTRIBUTE TO APPELLANT'S DISABILITY.

Appellant's condition was described by the United States Public Health Service Doctor at Queen's Hos-

pital in Honolulu and by the physician of the United States Marine Hospital in San Francisco as being a left hemiplegia resulting from a cerebral and generalized arteriosclerosis, together with cerebral thrombosis and encephalomalacia (Tr. 384-385). It is of some significance to note also that at neither hospital was any history of injury given by Appellant who, in fact, complained to the physician at the Marine Hospital that he had suffered a "stroke" (Tr. 384).

Dr. John Raaf, a Neuro-Surgeon of high standing in Portland, Oregon, examined Appellant on behalf of Appellee and diagnosed the disability as being a left hemiplegia resulting from a cerebral thrombosis and softening of the brain (Tr. 37). In his testimony before the District Court Dr. Raaf pointed out that the incident of the described blow on the head had nothing to do with causing or contributing to the Paralysis which developed approximately three weeks later and he explained his reasons as follows:

> "A. In my opinion the incident of the blow on the head has nothing to do with his present disability.
>
> Q. Will you elaborate for the Court and explain your opinion?
>
> A. Following a blow on the head several things can occur, and it does not seem to me that any of them could have occurred in this particular case. A blow on the head can produce a laceration or a bruising of the brain, but if that were the case, the patient should have had some symptoms right at the time the injury occurred.
>
> Q. Pardon me, Doctor. When you say some symptoms, what kind of symptoms do you have reference to?

A. He should have had headache, he should have had some weakness of an arm or a leg, or unconsciousness; he should not have been able to go on about his duties for the next two or three weeks, such as he did. A blow on the head can produce a condition we call subdural hematoma, but the course of his illness is not that of a subdural hematoma.

Q. A subdural hematoma is one in which there is a delayed result—in other words, the man gets a blow and then may go along for a few days or weeks and the slow hemorrhage eventually causes an unconsciousness or disability, is that it?

A. That is right. It causes a pressure in the head and the patient has severe headaches, dimming of consciousness, and a spinal fluid examination and examination of the backs of the eyes show all the signs of pressure.

Q. In this thrombosis, what part of the head and what part of the vessels of the brain is it your opinion are affected?

A. I think branches of the middle cerebral artery were affected in this man. He gives the history that the trouble began in the left hand and then gradually progressed to involve the left leg. I think the very small end branches of the artery were involved first, and the thrombus progressed back down the arterial tree to involve larger and larger branches, and finally the whole left side of the body was involved that I designate. * * *'' (Tr. 41-42).

The Doctor further explained that where there is a gradual development of paralysis, the symptoms would be such that the patient would be unable to

carry on his regular duties during the progress of the paralysis (Tr. 43). Dr. Raaf also testified that usually where a sufficient blow is received on the *left* side of the head, the hemiplegia and resulting paralysis affects the *right* side of the body; that is, the *right* leg and *right* arm (Tr. 45). As will be noted, Appellant claims to have been struck a relatively light blow on the *left* side of the head and his paralysis occurred some three weeks later, without any intervening symptoms, on the same side—the *left* arm and the *left* leg.

We need not dwell further on Dr. Raaf's clear-cut testimony, except to point out that Appellant's counsel vigorously and extensively cross-examined him, with the result that Dr. Raaf's opinion was considerably elaborated upon and strengthened.

III. THE DISTRICT COURT'S ALLOWANCE OF ONE YEAR'S MAINTENANCE WAS REASONABLE AND SUPPORTED BY THE EVIDENCE AS WAS THE COURT'S DENIAL OF ALLOWANCE FOR SO-CALLED "NURSING CARE."

Appellant complains of the Court's awarding of one year's maintenance, but the record will show no adequate proof has been offered to justify any further or additional allowance. The Marine Hospital in San Francisco discharged Appellant from further treatment on October 30, 1944 (Tr. 383), and Appellant then went home. Dr. Raaf testified that at the time of Appellant's discharge from the Marine Hospital he would conclude that the condition was practically sta-

tionary. In any event, Judge Goodman allowed maintenance for one year following Appellant's discharge from the Marine Hospital (Tr. 72). There is certainly no showing that any material improvement occurred after Appellant left the Hospital except that he regained "some little function that he did not have in his left leg and hand for a period of time of about one year" (Tr. 72).

As has been so well stated by the United States Supreme Court in the case of *Calmar Steamship Corporation v. Taylor,* 303 U. S. 523, 82 L. Ed. 993:

> "We find no support in the policies which have generated the doctrine for holding that it imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it. So far as we are advised it is without support in the authorities. We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care, and medical treatment. This would satisfy such demands of policy as underlie the imposition of the obligation. Beyond this we think there is no duty, at least where the illness is not caused by the seaman's service."

With regard to the claim for "nursing care" allegedly provided by Appellant's wife at home, we believe there was no evidence upon which the Court

could properly find that Appellant was entitled to such allowance. If Appellant's condition was such that he required nursing care, he should have returned to the U. S. Marine Hospital where such nursing care was certainly available to him without expense to anyone.

As further stated in the *Calmar* case, supra, 303 U. S. at page 531:

> "* * * Courts take cognizance of the marine hospital service where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service."

There has certainly been no showing made that Marine Hospital and nursing care were "not at the disposal of the seaman through recourse to that service."

IV. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR CONTINUANCE AT THE CONCLUSION OF THE CASE.

Appellant complains that the trial judge erred in not granting his motion for continuance on the ground of claimed surprise simply because the testimony of Appellee's witness, Dr. Raaf, "was allegedly different from that indicated in his report, his reasons, and so on." Counsel argued that, since he (counsel) is "not a medical man", he wanted to seek out another medical witness and submit to him a transcript of the testimony of Dr. Raaf (Tr. 109). We believe that

Judge Goodman's reasons for denying this continuance are so well stated that we can do no better than to quote him:

> "The Court. That ground addressed to the Court by an experienced practitioner is completely unpersuasive. You pressed this case for trial time after time, asking me for an early date, and I see nothing by way of surprise. There is nothing more in this case than the usual type of conflict in evidence that happens in a case. The time to investigate a case is, of course, before trial, and not afterwards. If your theory of asking for a further hearing in the matter were followed, it would mean that in every case every lawyer who is dissatisfied with the fact that the witnesses for the other side did not break down and confess that he was right would have the opportunity to ask for a further opportunity to investigate the case and no litigation would ever terminate." (Tr. 109-110.)

There was further argument by counsel for Appellant to the effect that in his testimony Dr. Raaf had "carried himself further than any doctor can go," to which the Court appropriately answered: "What you are talking about are matters that go to the weight of the testimony; that is for the Court to decide." (Tr. 110.)

V. THE AUTHORITIES CITED BY APPELLANT ARE DISTINGUISHABLE AND NOT IN POINT.

Appellant cites *United States v. One Device, Etc.*, 160 Fed. (2d) 194, apparently as authority for his claim that the Court's findings of fact were not

proper. That case merely holds that a finding of the trial Court is binding upon the Appellate Court if sustained by the record, but if such finding is "clearly erroneous" or is based upon a misapplication of law, it is not binding upon the Appellate Court, and that the trial Court's finding that "Libelant has not offered any substantial evidence upon which to entitle it to judgment as prayed" was clearly erroneous. Accordingly, such finding was set aside. This is merely a statement of elementary law.

The same may be said with regard to the other cases cited by Appellant, as for example, *United States v. Forness,* 129 Fed. (2d) 928, and *The Arizona v. Anelich,* 298 U. S. 110, 80 L. Ed. 1075. In the latter case it was held, among other rulings, that a seaman assumes the risks normally incident to his calling, but not that of negligent failure to provide a seaworthy ship and safe appliances. The seaman in that case was fatally injured when his leg became entangled in the purse line of a fishing net. With regard to whether there was evidence of negligence, the Court held as follows:

> "* * * it suffices to say that, although the testimony was conflicting, there was evidence from which the jury could have found that the clutch controlled by the lever at the winch was negligently allowed to remain in a defective condition; that because of the defect it would not remain engaged and the winch drums would not turn continuously unless the lever controlling the clutch was held in a position by the brace; that the use of the brace to prevent the worn clutch from slipping or disengaging, rendered the winch defec-

> tive and unsafe to those required to work in its vicinity and that the use of the brace, and the consequent delay in stopping the winch from the engine room, when the alarm was given, was the proximate cause of the injury and death." (At p. 117.)

Surely the facts of the case at bar are not in any wise comparable to the facts in *The Arizona v. Anelich,* supra.

The case of *United States v. Forness, et al.,* supra, involved an appeal to the United States Circuit Court of Appeals, Second Circuit, under the Federal Rules of Civil Procedure, arising out of a civil action to cancel a lease of land because of default in the payment of rent. The case was heard by the District Court without a jury. With regard to the Court's findings, the Circuit Court pointed out the requirement that such findings be made after careful consideration and with due care. The Court held that "the findings proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the District Court are not supported by the evidence and not substantially in accord with the opinion." (At page 942.) The Court further pointed out that the Appellant must overcome the heavy burden of showing that the findings of fact are "clearly erroneous." In further elaborating on the basis for requiring the trial judge to carefully consider the evidence and make proper findings, the Court stated (at page 943) that such responsibility "is not a light responsibility since, unless his findings are 'clearly erroneous', no upper

court may disturb them." It is respectfully submitted that there is no showing whatever in this case that Judge Goodman did not carefully consider the entire evidence, nor has it been shown that the findings of fact were not in accord with a preponderance of the evidence.

In *Kreste v. United States,* 158 Fed. (2d) 575, which Appellant has cited in support of his proposition that the question of whether or not an employer of a seaman has been negligent is "a question of law" (page 4 of Appellant's brief), it appears that a longshoreman was injured by reason of slipping on an oily deck. The United States Circuit Court held that "the judge's opinion and findings state facts which justify his legal conclusion as to Appellant's negligence. The evidence amply supports the judge on that issue of fact. It should be obvious by now that we will not consider Appellant's contentions which relate to the credibility of witnesses who testified in open court." (At page 577.) We do not see that this case is any authority for reversal of the District Court's judgment in the case at bar.

There are a number of other cases cited by Appellant which are likewise not in point and which involve legal principles which we do not dispute. It would therefore serve no useful purpose to review each of such authorities.

CONCLUSION.

It is respectfully submitted that on the facts and on the law there has been no showing of any negligence on the part of Appellee or any unseaworthiness in the condition of its vessel, which proximately caused or contributed to the occurrence of Appellant's alleged injury or disability. In conclusion we desire to emphasize the following points:

1. There was no competent proof of any negligence on the part of Appellee or any unseaworthiness of the vessel proximately causing or contributing to the alleged injury or disability and the District Court therefore did not err in denying recovery for damages. A preponderance of the evidence established that:

(a) The alleged injury, if it did occur, was of such minor significance that it was not disabling;

(b) That the Appellant's disability, which had its inception at Honolulu some three weeks after the claimed accident, was due to cerebral thrombosis and softening of the brain and was not caused or precipitated by the alleged injury;

(c) The only acceptable evidence in the record on the question of whether the vessel was unseaworthy and whether Appellee was negligent because of the absence of reels and mooring cables, was that such reels were not required nor customarily or otherwise maintained on Liberty vessels, or even on the larger Victory ships, and that the manner in which the work was being done at the time of the alleged mishap was the

usual and customary method and was considered safe practice; and

(d) In any event, Appellant failed to prove that the alleged injury was proximately caused or contributed to by such alleged unseaworthiness or negligence.

2. There is no showing of error on the part of the District Court in finding that Appellant was entitled to maintenance for the reasonable period of one year following his release from the Marine Hospital in San Francisco. Appellant failed to offer any competent evidence showing that the reasonable period of maintenance should exceed this allowance. On the other hand, testimony was offered on behalf of Appellee by Dr. John Raaf, a noted Neuro-Surgeon of Portland, Oregon, to the effect that Appellant's condition at the time of his release from the Marine Hospital in San Francisco was substantially stationary. The trial Court allowed maintenance for one year after this date, which would appear to be fair and reasonable under the circumstances.

3. The District Court's denial of recovery for so-called "nursing care" which was allegedly rendered by Appellant's wife at home following Appellant's discharge from the Marine Hospital in San Francisco was not erroneous, but in fact was fully supported by the evidence. There was no proper showing by any competent proof that Appellant was in need of nursing care or that such care, if needed, was not available at a United States Marine Hospital.

4. There was no error in the District Court's denial of Appellant's request for continuance of the trial on the grounds of alleged "surprise of the testimony" of Dr. Raaf, who testified on behalf of Appellee. Appellant's counsel had full opportunity to, and did extensively cross-examine Dr. Raaf at the trial. The mere fact that a witness cannot be broken down by cross-examination or that such witness maintains a view contrary to that of opposing counsel is surely no basis for counsel in any case to expect the trial Court to grant a continuance; indeed, it would be highly improper for the Court to do so.

Appellee respectfully submits that the decree of the District Court, which is in all particulars fully supported by the evidence, should be affirmed.

Dated, San Francisco, California,
February 10, 1948.

FRANK J. HENNESSY,
United States Attorney,
Proctor for United States of America.

JOHN H. BLACK,
EDWARD R. KAY,
HENRY W. SCHALDACH,
Of Counsel for United States of America.